L.W.D., Inc., L.W.D. Sanitary Landfill, Inc., L.W.D. Trucking, Inc., L.W.D. Field Services, Inc., and Robert Terry, Inc., a Single Integrated Enterprise *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO. Cases 26-CA-18390, 26-CA-18420, 26-CA-18538, 26-CA-18573, 26-CA-18625

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On December 23, 1998, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a brief in opposition to the General Counsel's cross-exceptions and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as discussed below, to modify his remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

The General Counsel has excepted, inter alia, to the judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(1) of the Act by threatening employees, in an October 2, 1997 letter,[*] with the loss of their jobs if they selected the Union as their bargaining representative. We find merit to the General Counsel's exception, and we reverse the judge's recommendation to dismiss this allegation.[3]

The letter, signed by LWD Inc.'s President William O'Brien and the Respondent's owner, Amos Shelton, and sent to employees, stated:

> Some of our employees have been working to bring a union into our company. Many of you will recall that unions have tried to organize our employees four times in the past. LWD employees have said "NO" to union promises and have turned them down in every election.
>
> Let me clearly state LWD's position in this important matter:
>
> WE DO NOT WANT A UNION!
>
> WE DO NOT FEEL THAT A UNION WOULD BENEFIT OUR EMPLOYEES!

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[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent unlawfully solicited grievances through Harland Timmons, we note that the Respondent has not excepted to the judge's finding that Timmons was a supervisor under Sec. 2(11) of the Act.

[2] We have modified the judge's recommended Order to conform more closely to his findings. We have corrected his failure to order the Respondent to cease and desist from calling employees back to general labor pool positions without bargaining (par. 1(l)), and his failure to order the Respondent to take the following affirmative action necessary to effectuate the policies of the Act: bargain with the Union, on request, about calling employees back to general labor pool positions, and about the use of a "forced ranking" system (pars. 2(g) and (f)).

Further, under *Lapeer Foundry & Machine*, 289 NLRB 952, 955—956 (1988), "the traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes ordering the employer to bargain over the layoff decision and the effects of that decision, reinstating the laid-off employees, and requiring the payment to the laid-off employees of full backpay, plus interest, for the duration of the layoff." *Ebenezer Rail Car Services, Inc.*, 333 NLRB 167 (2001). Thus, we have also corrected the judge's failure to order the Respondent to bargain with the Union, on request, about the layoff decisions and their effects (par.2(e)).

We note that the following employees who were unlawfully laid off on December 12, 1997, and were recalled on February 24, 1998, were unlawfully laid off again on March 12, 1998: Charles Amato, Tray Bobo, Joe Canup, Malcolm Couch, Shane Emmons, David Meredith, Joseph Riley, Paul Roberson, and Robert Stack. Renee Sims was unlawfully laid off on December 12, 1997, recalled on February 25, 1998, and unlawfully laid off on March 12, 1998. Perry Moxley was unlawfully laid off on December 12, 1997, recalled on March 6, 1998, and unlawfully laid off on March 12, 1998. Rocky Hill was unlawfully laid off on December 12, 1997, but had not returned to work for the Respondent. We have corrected the judge's inadvertent omission of Rocky Hill from the list of employees unlawfully laid off on December 12, 1997 (par. 2(d)).

We have corrected the judge's failure to include an expunction remedy regarding Wall's discharge (par. 2(c)), and we have modified the judge's make whole remedies regarding the layoffs to reflect more accurately the computation of earnings and other benefits and interest pursuant to *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1989) (pars. 2(b) and (d)). We have also modified the judge's recommended order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996) as modified in *Excel Container, Inc.*, 325 NLRB 17 (1997) (par. 2(i)), and in accordance with our recent decision in *Ferguson Electric Co.*, 333 NLRB 142 (2001) (par. 2(h)).

Finally, we have also modified the Order to reflect our finding, contrary to the judge, that the Respondent violated Sec. 8(a)(1) of the Act by making a threat of job loss to employees (par. 1(f)).

[*] The judge inadvertently refers to the date of the letter as October 2, 1998.

[3] We find it unnecessary to pass on the General Counsel's further exception concerning the judge's failure to discuss and find that the Respondent, through Operations Supervisor Burnett, violated Sec.8(a)(1) by telling employee Davenport that it would be futile to select a union. The finding of this additional violation would be cumulative and would not affect the remedy.

> WE WILL OPPOSE THE UNION BY EVERY LEGAL AND PROPER MEANS!
>
> During the next several weeks, you will probably hear all kinds of promises from the union organizers. Remember, union promises are worth exactly what they cost – NOTHING!
>
> We intend to give you many facts and opinions about unions during the next several weeks. This is a very serious matter for you and your families, so please think about it carefully. Then, on the day of the election, vote as if your job depends on it.
>
> We will be glad to answer any questions you have at any time.

The judge found, and we agree, that President O'Brien's statement to recently laid off employee James Malone that the employees had been told "to vote as if their jobs depended on it" constituted an unlawful threat linking the election outcome with job security.[4] The judge, however, did not find the very same statement in the above-quoted letter to be an unlawful threat. He bases this conclusion on his interpretation of the phrase "as if." This phrase, he suggests, "conveys the sense of something untrue or not likely to be true," and thus brings a "cargo of doubt to the sentence tying an employee's vote to his job security."

The judge concludes that the statement to Malone did not carry the same "cargo of doubt" because it was made to him as he was being laid off. The judge does not explain, however, how the circumstances surrounding the sending of the Respondent's October 2 letter would have caused the employees to understand the "as if" phrase differently than Malone understood it. In any event, we reject the judge's interpretation of the phrase "as if" because it simply makes no sense in this context. It is true, as the judge notes, that the phrase "as if" is not limited to the meaning "as it would be if,"[5] but can also be used colloquially as a mocking expression. For example, the statement "as if you were the world's greatest athlete" is meant to mock the athletic ability of the person to whom it is addressed. By suggesting that the "as if" phrase in the Respondent's letter "conveys the sense of something untrue or something not likely to be true," the judge suggests that the Respondent's letter used the "as if" phrase in this second way. However, it simply makes no sense that the Respondent would have meant to use it in such a way. This is because the Respondent would have then intended to mock whether the employees' jobs were at stake in saying "vote as if your job depends on it." This strains any reasonable interpretation of the statement beyond the breaking point.

Thus, in this context, the words "as if" simply mean what they usually do, i.e., "as one would do if." The Respondent was not using the phrase "as if" in a figurative or metaphorical sense. To the contrary, the Respondent was using the phrase in a literal sense. Accordingly, employees would reasonably have interpreted the Respondent's letter to mean exactly what it said, i.e., "[t]his is a very serious matter for you and your families, so please think about it carefully. Then, on the day of the election, vote as if your job depends on it." In other words, they should understand that their very job security, and their families' financial future, depended on how they voted in the election. It is hard to imagine a statement that would more clearly express to the employees the possibility that they would lose their jobs unless they voted against the Union. And, in fact, as discussed above, on December 12, 1 week after the Union won the election, O'Brien confirmed the threatening intent of the above-quoted letter by reminding employee Malone, who had been laid off that day, that employees had been told to vote as if their jobs depended on it. Our dissenting colleague concedes that, in the context of O'Brien's remark to Malone, "there was a direct and immediate nexus between voting for representation and employee job loss." However, our colleague contends that, because "no unlawful layoffs preceded the issuance of O'Brien's letter," O'Brien's letter cannot be compared to his subsequent statement to Malone. Contrary to our colleague, there is a clear connection between O'Brien's letter and his subsequent statement to Malone. The very nature of a threat of job loss (as contained in the October 2 letter) is that it foreshadows something that may occur. Thus, the fact that no layoffs *preceded* O'Brien's letter is irrelevant.[6]

[4] See *Dutch Boy, Inc.*, 262 NLRB 4, 41 (1982), enfd. sub nom. *Artra Group, Inc. v. NLRB*, 703 F.2d 586 (10th Cir. 1984) (statement "vote as if your job depended upon it," made during organizing campaign, found to be unlawful threat).

[5] Webster's Ninth New Collegiate Dictionary contains the following definitions for the term "as if": "as it would be if; as one would do if; that". Webster's Ninth New Collegiate Dictionary 107 (9th ed. 1990).

[6] In parsing the Respondent's phrase "vote as if your job depends on it" our dissenting colleague has overlooked the rest of the letter, most significantly, the language regarding employees' families. However, as famously stated by Judge Learned Hand (in a case predating Sec. 8(c)), words must be analyzed in terms of the context in which they appear, for

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart… .

The well-established test for determining whether an employer's conduct violates Section 8(a)(1) is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Contrary to the judge, we find that the Respondent's letter threatened that unless the employees voted against the Union their job security would be in peril.[7] Accordingly, we reverse the judge and find that the Respondent's letter violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, L.W.D., Inc., L.W.D. Sanitary Landfill, Inc., L.W.D. Trucking, Inc., L.W.D. Field Services, Inc., and Robert Terry, Inc., a single integrated enterprise, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities or sympathies, or about the union membership, activities or sympathies of other employees.

(b) Informing employees that collective bargaining would be futile, that the employees would not gain anything from it and that the Respondent would not sign a collective-bargaining agreement.

(c) Making threats of unspecified reprisal against employees who engage in handbilling on behalf of the Union or other union or concerted activities protected by the Act.

(d) Promulgating or maintaining any rule prohibiting employees from discussing the Union, characterizing such discussion as a strike, or threatening employees who discuss the Union with discharge or other adverse employment action.

(e) Implying to any employee that he or she had been laid off because employees selected the Union as their collective-bargaining representative.

(f) Making threats of job loss to employees by telling employees to vote as if their jobs depended on it.

(g) Telling employees that a scheduled wage increase has been cancelled because of the Union or the employees' union organizing campaign.

(h) Soliciting grievances from employees and promising, either directly or by implication, to remedy them if the employees did not select a union to represent them.

(i) Discharging any employee because the employee joined or supported the Union or engaged in other activities protected by the National Labor Relations Act.

(j) Implementing a "forced ranking" system or other procedure for selection of bargaining unit employees for any adverse employment action without first notifying and bargaining with the Union in accordance with the Respondent's duty to bargain in good faith under the Act.

(k) Laying off employees without first notifying and bargaining with the Union in accordance with the Respondent's duty to bargain in good faith under the Act.

(l) Recalling laid off employees to general labor pool positions without first notifying and bargaining with the Union in accordance with the Respondent's duty to bargain in good faith under the Act.

(m) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) Within 14 days from the date of this Order, offer William Jeffery Wells full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Jeffrey Walls whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of William Jeffrey Walls, and within 3 days thereafter notify this employee in writing that this has been done and that the unlawful discharge will not be used against him in any way.

(d) Make whole employee Shawn Baze, laid off effective December 8, 1997, and make whole the employees named below, laid off effective December 12, 1997, for any loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

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NLRB v. Federbrush Co., 121 F.2d 954, 957 (2d Cir. 1941).

[7] *Leyendecker Paving, Inc.*, 247 NLRB 28 (1980), which is cited by the Respondent, is distinguishable from the instant case. In *Leyendecker Paving*, the General Counsel relied, inter alia, on unspecified threats of layoff to establish antiunion animus, but did not identify what alleged threats he was referring to or specifically allege that the phrase "be sure and vote and vote as if your job depended upon it," which was included in an employer's campaign leaflet, constituted an unlawful threat of layoff. The judge found that the "be sure and vote and vote as if your job depended upon it" statement was protected by Sec. 8(c) because, when read in context with the rest of the leaflet, it essentially amounted to a prediction that layoffs might result from increased costs and changes in the employer's operation. *Leyendecker Paving, Inc.*, supra, at 36. Unlike the leaflet in that case, O'Brien's letter cannot be characterized as a benign prediction of economic costs brought on by unionization.

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

Charles Amato	Mike Lech
Chris Bell	Ron Mackezie
Donnie Blair	James Malone
Tray Bobo	Kenneth May
Joe Canup	David Meredith
Mike Clark	Perry Moxley
Malcolm Couch	Scottie Norman
Daniel Crass	Derrick Raye
Roger Davenport	Merlin Reed
James Dodson	Joseph Riley
Shane Emmons	Paul Roberson
Benny Garland	Renee Sims
Lee Hansen	Robert Stack
Rocky Hill	Dean Tolbert
Michael Hunt	Joe Wright
Brian Hurley	

Respondent shall similarly make whole, in the manner described above, the employees named below, laid off effective March 12, 1998:

Charles Amato	David Meredith
Tray Bobo	Perry Moxley
Joe Canup	Joe Riley
Malcolm Couch	Renee Sims
Shane Emmons	Paul Roberson
Curtis Mayberry	Robert Stack

Additionally, in the event that the Respondent has failed to offer recall to any of these named employees, it shall offer the employees named above full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) On request, bargain with the Union concerning the decisions to lay off bargaining unit employees effective December 8, 1997, December 12, 1997, and March 12, 1998, and the effects of those decisions.

(f) On request, bargain with the Union concerning the decision to institute a "forced ranking" system or other procedure for selection of bargaining unit employees for any adverse employment action.

(g) On request, bargain with the Union concerning the decision to recall laid off employees to general labor pool positions.

(h) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Calvert City, Kentucky, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[8] Copies of this notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 1997.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I conclude that the October 2, 1997 letter from the Respondent's president, William O'Brien, to employees is free speech protected by Section 8(c). The letter, which is quoted in the majority opinion, is campaign propaganda that expresses the Respondent's dislike of unions and desire to remain nonunion. Despite this, my colleagues condemn a single phrase in the letter, i.e., O'Brien's urging of employees in the letter to "vote as if your job depends on it."

My colleagues concede, as they must, that the phrase "as if" is defined in *Webster's Dictionary* to mean "as it would be if" or "as one would do if." Thus, the phrase means that something is not true in fact, but that a person should act as if it were true. Accordingly, Respondent was saying to employees that their jobs were in fact *not* dependent on their vote, but they should act "as if" their jobs were so dependent. My colleagues have trans-

[8] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

formed the phrase to mean that the jobs were in fact dependent on the vote. As discussed, this is precisely the opposite of what the phrase means.

In any event, I do not think that this issue can be resolved solely by a dry "dictionary" parsing of the words "as if." Rather, I believe that, as in 8(a)(1) cases generally, the issue is to be resolved by the context in which the words appear. The entire tenor of the instant letter is to persuade employees that their terms and conditions of employment would not necessarily be better with a union. That is, union promises were not to be believed. In context, the phrase "your job depends on it" is a reference to the *terms and conditions of the job*, not a reference to a loss of job. Thus, in my view, the letter as a whole cannot reasonably be read to say that the selection of the Union would result in discharge. The letter's reference to "families" does not support the position of my colleagues. Obviously, the terms and conditions of employment are as important to employee families as they are to employees.

My colleagues also miss the mark by suggesting that this campaign literature is the same as O'Brien's statement to employee James Malone over 2 months later. As discussed above, such statements must be viewed in context. The O'Brien-Malone conversation occurred a week after the Union had been certified, and the Respondent had unlawfully refused to bargain over layoffs, including Malone's. Immediately after being told that he was on layoff, and as he was being escorted out of the plant, Malone was reminded by O'Brien that employees had been told to vote as though their jobs depended on it. In this context, there was a direct and immediate nexus between voting for representation and employee job loss. The same is true in the precedent relied on by the majority. In *Dutch Boy, Inc.,* 262 NLRB 4 (1982), enfd. sub nom. *Artra Group, Inc. v. NLRB*, 703 F.2d 586 (10th Cir. 1984), employees were reminded to "vote as if your job depended on it" on the heels of the unlawful layoff of approximately a quarter of the work force.

My colleagues insist on evaluating the October 2 letter in the context of what happened 2 months later, i.e., at the time of the O'Brien-Malone conversation. I disagree. The statement in the October 2 letter is to be assessed as of the time that employees read it. At that time, there had been no layoffs or job losses. Thus, employees would not read into it a threat of job loss. I recognize that, 2 months later, there was a reference to the statement in the context of a job loss. However, that does not render unlawful the earlier statement.

In sum, the O'Brien statement to Malone was unlawful in context, but that does not mean that a statement made 2 months earlier in a different context is unlawful. In this latter regard, and in contrast to the circumstances in *Dutch Boy,* no unlawful layoffs preceded the issuance of O'Brien's letter. Accordingly, I would dismiss that 8(a)(1) allegation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union membership, activities, or sympathies, or about the union membership, activities, or sympathies of other employees.

WE WILL NOT inform employees that collective-bargaining would be futile, that the employees would not gain anything from it and that we would not sign a collective-bargaining agreement.

WE WILL NOT make threats of unspecified reprisal against employees who engage in handbilling on behalf of the Union or other union or concerted activities protected by the Act.

WE WILL NOT promulgate or maintain any rule prohibiting employees from discussing the Union, characterize such discussion as a strike, or threaten employees who discuss the Union with discharge or other adverse employment action.

WE WILL NOT imply to any employee that he or she had been laid off because employees selected the Union as their collective-bargaining representative.

WE WILL NOT make threats of job loss to employees by telling employees to vote as if their job depended on it.

WE WILL NOT tell employees a scheduled wage increase has been cancelled because of the Union or because of the employees' union organizing campaign.

WE WILL NOT solicit grievances from employees and promise either directly or by implication, to remedy them if the employees do not select a union to represent them.

WE WILL NOT discharge any employee because that employee joined or supported the Union or engaged in other activities protected by the National Labor Relations Act.

WE WILL NOT implement a "forced ranking" system or other procedure for selection of bargaining unit employees for any adverse employment action without first notifying and bargaining with the Union in accordance with our duty to bargain in good faith under the National Labor Relations Act.

WE WILL NOT lay off employees without first notifying and bargaining with the Union in accordance with our duty to bargain in good faith under the National Labor Relations Act.

WE WILL NOT recall laid off employees to general labor pool position without first notifying and bargaining with the Union in accordance with our duty to bargain in good faith under the National Labor Relations Act.

WE WILL NOT discharge or take any adverse employment action against an employee because the employee joined or supported the Union, engaged in Union or protected, concerted activities or to discourage other employees from joining or supporting the Union or engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to employee William Jeffrey Walls to his former job or, if his former job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Jeffrey Walls whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of William Jeffrey Walls, and WE WILL , within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, on request, bargain with the Union concerning the decisions to lay off bargaining unit employees effective December 8, 1997, December 12, 1997, and March 12, 1998, and the effects of those decisions.

WE WILL, within 14 days from the date of the Board's Order, reinstate any of the following employees who have not been recalled from layoffs which violated the National Labor Relations Act to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, and WE WILL make all of the following employees whole, with interest, for all losses they suffered because we laid them off without first notifying and bargaining with the Union in accordance with our obligations under the Act:

Charles Amato	Mike Lech
Shawn Baze	Ron Mackezie
Chris Bell	James Malone
Donnie Blair	Kenneth May
Tray Bobo	Curtis Mayberry
Joe Canup	David Meredith
Mike Clark	Perry Moxley
Daniel Crass	Scottie Norman
Malcolm Crouch	Derick Raye
Roger Davenport	Merlin Reed
James Dodson	Joseph Riley
Shane Emmons	Paul Roberson
Benny Garland	Renee Sims
Lee Hansen	Robert Stack
Rocky Hill	Dean Tolbert
Michael Hunt	Joe Wright
Brian Hurley	

WE WILL, on request, bargain with the Union concerning the decision to institute a "forced ranking" system or other procedure for the selection of bargaining unit employees for any adverse employment action.

WE WILL, on request, bargain with the Union concerning the decision to recall laid off employees to general labor pool positions.

L.W.D., INC., L.W.D. SANITARY LANDFILL, INC., L.W.D. TRUCKING, INC., L.W.D. FIELD SERVICES, INC., AND ROBERT TERRY, INC., A SINGLE INTEGRATED ENTERPRISE

Bruce Buchanan, Esq., for the General Counsel.
Edwin S. Hopson, Esq. and *George Seay, Esq. (Wyatt, Tarrant & Combs)* of Louisville, Kentucky, for the Respondent.
Judith Wilson, for the Charging Party

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on June 15–18, July 6–9, August 27–28 and 31, 1998, in Calvert City, Kentucky. After the parties rested, I heard oral argument, and on October 5, 1998, issued a Bench Decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regu-

lations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

General Counsel's Motion For Reconsideration

Following my oral delivery of the Bench Decision while on the record on October 5, 1998, counsel for the General Counsel filed a Motion for Reconsideration. It states, in pertinent part, as follows:

> In his Bench Decision, [the judge] credited the testimony of employee Robert Palmer that discriminatee Greg Cummins cursed Palmer and fellow employee, Chris Bell, for "an hour." Therefore, Judge Locke found the examples of disparate treatment presented by the Counsel for the General Counsel were in opposite. But, the record reflects Palmer testified to the following:
>
> > That's what he (Cummins) asked us where the fuck we'd been and he said he'd—he called us motherfuckers. And he said he'd been looking for—he said, I've been looking for you son of a bitches for over an hour. I think that's what he pretty much said. He was pretty mad. (Tr. 2320, lines 10–14)
> >
> > Thus, Cummins did not curse Palmer and Bell for an hour, rather, he said he had been looking for them an hour. The cursing only took a matter of seconds.
> >
> > Based upon the credited testimony of Palmer, Counsel for the General Counsel asserts its evidence of other cursing incidents are examples of Respondent's disparate treatment. The cursing incidents are supervisor Harland Timmons to employee Robert Palmer; employee Roger Davenport to employee Merlin Reed, and reported to supervisor Nathan Salyers; acting supervisor Mike Simmons to employees Frankie Elkins, Mitch Heath, and Reed; Simmons to employee Ron MacKenzie and reported to supervisor Joe Payne; supervisor Payne to employee Kevin Morris; and supervisor Payne to employee James Smith. Furthermore, these incidents when coupled with Respondent's admitted failure to investigate Cummins' examples of profanity and Cummins' high–profile role in the union campaign demonstrate Respondent failed to rebut Counsel for the General Counsel's *prima facie* case.

Therefore, the General Counsel urged that I reconsider my determination that the Respondent's suspension and discharge of Cummins did not violate the Act, and my recommendation that complaint paragraphs 15(a) and 15(b) be dismissed. However, the Respondent disagrees. In a Response opposing the General Counsel's Motion for Reconsideration, the Respondent stated, in pertinent part, as follows:

> Counsel for the General Counsel takes great liberty with the record when he states that Cummins' abuse of Palmer and Bell "only took a matter of seconds." Insofar as Respondent can determine, the record does not reveal exactly how long Cummins' tirade against Palmer and Bell lasted. However, the written statement which Bell gave to LWD management during its investigation of the incident reveals that it lasted more than a few seconds. Bell stated:
>
> > When we passed the Unit 3 Control room, I saw Greg Cummins sitting in the Control Room and he waved at us. Then he came running up to us and started to curse at us, saying he had been looking for us for over an hour and asked us where we had been. He was cursing me directly and calling me filthy names; he acted angry.
> >
> > Bobby and I told him where we had been and then we turned and returned toward the Prep Area, *Greg came up to us again and cursed us*. We then returned to Prep without talking to Greg any further [Resp. Exh. DD (emphasis added)].
> >
> > Thus, Cummins gave Palmer and Bell not one but two tongue lashings, interspersed by their explanation of where they had been. Based upon this and the other evidence of the incident, we may reasonably infer that it lasted more than a few seconds.
> >
> > LWD submits that it was the nature of Cummins' abuse of Palmer and Bell, not its length, which most concerned LWD at the time. The significant facts, which Judge Locke correctly found and relied upon, were, first, that Cummins' abuse of Palmer and Bell was so serious and extreme that both men stated unequivocally that they would no longer work for Cummins [Palmer, Tr. 2322; Dunnigan, Tr. 1715; Slaughter, Tr. 1777; Resp. Exh. DD, EE].

As noted by the General Counsel, the Bench Decision incorrectly stated that Cummins upbraided the two other workers for an hour. The record does not establish how long Cummins' oral chastisement of Palmer and Bell lasted. Therefore, I will not consider the duration of the invective in deciding whether or not the Respondent would have discharged Cummins in any event, regardless of his union activities.

The General Counsel also correctly points to instances in which other persons employed by the Respondent, including at least one supervisor, engaged in conduct arguably as serious as Cummins' actions, and yet were not discharged for it. For example, employee M. Robert Palmer III testified that a supervisor, Harland Timmons, "bent me over, double, at the waist and run my head into the wall, spun me around and run my head into the door. Opened the door and said, get out." Palmer further testified that Timmons used an expletive between "get" and "out" but could not recall with certainty which expletive Timmons invoked.

Palmer reported this incident to a supervisor[2] but the record does not reflect what discipline, if any, Timmons received. He was still working for the Respondent as a maintenance supervisor at the time of hearing.

[1]The decision appears in the uncorrected transcript at pages 2625 through 2668. As the Bench Decision appears in Appendix A, hereto, oral and transcriptional errors have been corrected.

[2]The supervisor was James Chris Dunnigan. Although he testified, Dunnigan was not asked about the incident between Timmons and Palmer, and did not mention it.

Timmons testified before Palmer took the stand. He did not mention such an incident with Palmer, but no one asked him about it. Therefore, the seriousness of this alleged altercation must be assessed based on Palmer's testimony alone. It does not appear that Palmer considered what Timmons did to be as troubling as the cursing he received from Cummins.

In fact, it appears from his testimony that Palmer considered himself somewhat responsible for Timmons' reaction. That testimony indicates that Palmer provoked Timmons' response by trying to grab his ear. Thus, Palmer stated, "I went to grab his ear, and I didn't know his back was hurt at the time. I was the person—wrong person at the wrong place at the wrong time."

The General Counsel had raised this matter while cross–examining Palmer, and suggested to the witness that Timmons had been "pretty mad." However, Palmer's response did not suggest that amount of anger: "Yes, he was a little upset," Palmer testified, "I mean, they had been messing with him and, like I say, I walked in at the wrong time."

To determine whether Respondent treated Cummins differently from Timmons requires looking at the facts that were known to management at the time it made the decision in each instance. Palmer's testimony does not indicate that he was nearly as concerned about Timmons' conduct as he was about Cummins. To the contrary, Palmer appeared to regard Timmons' action as an isolated incident which occurred when Timmons was suffering back pain and Palmer, unaware of the pain, pulled Timmons' ear.

The record does not establish that Palmer ever told management that he could not work with Timmons, or ever asked to be separated from Timmons while at work. However, Palmer repeatedly stated to management that although he did not want Cummins to lose his job, he could not work with Cummins and one of them should be moved to work elsewhere. Therefore, management was aware that some action had to be taken with respect to Cummins. However, there is no evidence that management was aware of, or believed there to be, any comparable problem regarding Timmons.

As the General Counsel notes, the record documents other instances in which an employee or supervisor cursed another person while on the job. However, the evidence does not establish that Respondent claimed that it based its decision to discharge Cummins on his use of profanity. Rather, I find that Respondent felt the need to take action against Cummins because his conduct, including the profanity, made other employees unwilling to work with him.

In explaining why management decided to terminate Cummins' employment, Respondent's president, William O'Brien, referred both to the language Cummins had directed at the other workers and to the question of whether he could be trusted: "You know he had made comments that he had gone to the guard, gone to the radio. The things that he said just weren't credible and you know the evidence that I saw from the two employees was credible."

In sum, I find that Respondent decided to discharge Cummins because his actions made others unwilling to work with him, and because management did not consider him to be trustworthy. These factors distinguish the Cummins situation from the instances, cited by General Counsel, in which other workers used profanity. Although I have reconsidered my decision to recommend dismissal of complaint paragraphs 15(a) and 15(b), as requested by the General Counsel, I have reached the same conclusion stated in the Bench Decision: Respondent would have suspended and discharged Cummins regardless of his protected activities. Therefore, I recommend that complaint paragraphs 15(a) and 15(b) be dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as "Appendix B."

Respondent unlawfully discharged its employee, William Jeffery Walls, on or about November 1, 1997. It shall be ordered to reinstate Walls, and to make him whole, with interest, for any losses he suffered because of the unlawful discrimination against him.

Additionally, Respondent must make whole, with interest, the employees whom it laid off in violation of Section 8(a)(5) and (1) of the Act. My specific findings with respect to those layoffs are described below.

I have found that Respondent laid off employee Shawn Baze on December 8, 1997 and laid off employee James Malone on December 12, 1997, as alleged in complaint paragraph 17(a)[3], in violation of Section 8(a)(5) and (1) of the Act.[4] Further, I have found that, as alleged in complaint paragraph 17(b), on about December 12, 1997, Respondent laid off the following employees, who were recalled on February 24, 1998: employees Charles Amato, Chris Bell, Tray Bobo, Joe Canup, Mike Clark, Malcolm Couch, David Meredith, Derick Raye, Joseph Riley, Robert Stack, Joe Wright, Shane Emmons, Benny Garland, Lee Hansen, Michael Hunt, Brian Hurley, Kenneth May, Scottie Norman, Merlin Reed, Paul Roberson, and Dean Tolbert; these layoffs also violated Section 8(a)(5) and (1) of the Act.

Further, I have found that, as alleged in complaint paragraph 17(c), about December 12, 1997, the Respondent laid off the following employees, who were recalled on about February 17, 1998: Donnie Blair, Daniel Crass, Roger Davenport, James Dodson, Mike Lech, and Ron Mackezie. These layoffs also violated Section 8(a)(5) and (1).

Additionally, I have found, as alleged in complaint paragraph 17(d), that about December 12, 1997, Respondent laid off the following employees: Renee Sims, who was recalled on February 25, 1998; Perry Moxley, who was recalled on March

[3] Although par. 17(a) of the complaint alleges that Respondent laid Malone off on December 8, 1997, the evidence establishes that the layoff took place 4 days later. Thus, Malone testified that he was terminated on December 12, 1997, rather than laid off on December 8, 1997. He further testified that Respondent returned him to employment 5 days later. I find that Respondent laid Malone off on December 12, 1997 and recalled him on December 17, 1998. The minor discrepancy between the pleadings and the proof does not affect my finding that the layoff violated Sec. 8(a)(5) and (1) of the Act.

[4] I find that Baze was recalled to work on about December 26, 1997.

6, 1998, and Rocky Hill, who has not returned. These layoffs also violated Section 8(a)(5) and (1).

Moreover, I have found, as alleged in complaint paragraph 20(a), that about March 12, 1998, Respondent laid off the following employees: David Meridith, Joe Canup, Joe Riley, Shane Emmons, Malcolm Couch, Tray Bobo, Robert Stack, Renee Sims, Charles Amato, Paul Roberson, Curtis Mayberry, Perry Moxley. These layoffs violated Section 8(a)(5) and (1).[5]

Respondent laid off all of the employees named above at a time when it had a duty to notify and bargain with the Union before doing so. It must offer immediate and full reinstatement to all of the name employees who have not been recalled from layoff. Additionally, it must make all of the named employees whole, with interest, for all losses suffered because of Respondent's unlawful action.[6]

[Recommended Order omitted from publication.]

APPENDIX A

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P R O C E E D I N G S
9:30 A.M.

OCTOBER 05, 1998

JUDGE LOCKE: On the record. I assume the Court Reporter is there.

COURT REPORTER: You got it.

JUDGE LOCKE: This is a Bench Decision in the case of L.W.D. Inc., L.W.D. Sanitary Landfill Inc., L.W.D. Trucking Inc., L.W.D. Field Services Inc. and Robert Terry Inc., a single integrated enterprise which I shall call the Respondent, and Oil, Chemical and Atomic Workers International Union, AFL-CIO, which I will call the Charging Party or the Union. The case numbers are 26-CA-18390, 26-CA-18420, 26-CA-18538, 26-CA-18573 and 26-CA-18625.

This decision is issued pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Based upon the allegations raised by the General Counsel of the National Labor Relations Board, Respondent's Answers to those allegations, and the record as a whole, I find the following undisputed facts to be true.

On about November 20, 1997 the Oil, Chemical and Atomic Workers International Union, AFL–CIO, which I will call the Union or Charging Party, filed a charge against L.W.D. Incorporated in Case 26-CA-18390. The Union amended this charge on about March 5, 1998. On about December 15, 1997, the Union filed a charge against L.W.D. Incorporated in Case 26-CA-18420. The Union amended this charge on about March 6, 1998. The amendment added the name of a second party, L.W.D. Sanitary Landfill Inc., as an employer, along with L.W.D. Inc. On March 16, 1998 the Regional Director of Region 26 of the National Labor Relations Board, acting on behalf of the General Counsel of the Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which brought together Cases 26-CA-18390 and 26-CA-18420 for trial. This consolidated complaint alleged in part that L.W.D. Inc. and L.W.D. Sanitary Landfill Inc. constituted a single integrated business enterprise and a single employer within the meaning of the National Labor Relations Act. This complaint further alleged that L.W.D. Inc. and L.W.D. Sanitary Landfill Inc. had engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act and that such unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act. On

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about February 27, 1998, the same Union filed an unfair labor practice charge against L.W.D., Inc. in Case 26-CA-18538. The Union amended this charge on about April 17, 1998 and again on about April 20, 1998. More specifically, on about April 17, 1998, the Union amended this charge, in part, by naming L.W.D. Inc., L.W.D. Sanitary Landfill Inc., L.W.D. Trucking Inc., and Robert Terry, Inc., as the charged party and alleging that these four corporations constituted a single integrated enterprise. This amended charge only alleged violations of Section 8(a)(1) and (3) of the Act. However, on about April 20, 1998, the Union filed a second amended charge in Case 26-CA- 18572. The second amended charge alleged that the single integrated enterprise had violated Sections 8(a)(1), (3) and (5) of the Act. On April 22, 1998, the Regional Director of Region 26 of the Board, acting on behalf of the Board's General Counsel, issued a second Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. This Order brought together Cases 26-CA-18390 and 26-CA-18420, which previously had been consolidated for hearing with Cases 26-CA-18538 and 26-CA-18573. On April 28, 1998, the Union filed a charge in 26-CA-18625. This charge named L.W.D. Inc., L.W.D. Sanitary Landfill Inc., L.W.D. Trucking, Inc., and Robert Terry, Inc. as the employer. It alleged violations of Sections 8(a)(1), (3) and (5) of the Act.

On May 15th, 1998, the Union amended the charges it had filed in Case 26-CA-18625. The amendment added the name of another entity, L.W.D. Field Services, Inc., to the other four the original charge had listed as names of the employer. The amended charge also alleged that all five of these entities, L.W.D. Inc., L.W.D. Sanitary Landfill Inc., L.W.D. Trucking Inc., L.W.D. Field Services, Inc., and Robert Terry, Inc., constituted a single integrated enterprise.

The amended charge in Case 26-CA-18625 added the allegation that commencing on about December 8th, 1997, the Respondent unlawfully refused to grant a 50-cents-per-hour across the board wage increase to employees represented by the Union granting such a pay raise to Non-Union employees. It also raised the allegation that commencing on or about December 8, 1997, and continuously thereafter, the Respondent refused to notify and bargain with the Union over the alleged refusal to

[5] The record does not reflect when certain of these individuals were recalled. If necessary, the determination of the backpay periods for such individuals must be left to the compliance stage.

[6] Respondent made certain of these unilateral changes immediately before the Board issued its Certification of Representative, and made the remainder of the unilateral changes during the first year after certification. However, the record does not establish that these unlawful actions affected negotiations for a collective-bargaining agreement. Therefore, I do not recommend that the certification year be extended. See *Visiting Nurse Services of Western Massachusetts,* 325 NLRB (1998).

grant such a 50–cents–per–hour across the board wage increase to Union employees. On May 8, 1998, the Regional Director issued a third Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in this matter, naming all five entities as a single integrated enterprise.

On June 8, 1998, the General Counsel, by the Regional Director of Region 26, issued an amendment to the Third Consolidated Complaint. Additionally, Counsel for the General Counsel further amended the Third Consolidated Complaint orally at trial. I will refer to the Third Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, as amended, simply as the Complaint. Also for simplicity, I will use the term Respondent to refer collectively to the five employers which constitute the single integrated enterprise.

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The hearing in this case opened before me on June 15, 1998. It continued on the following dates in 1998: June 16 through 18, July 6 through 9, August 27, 28, and 31. On September 30 and October 2, 1998, I heard oral argument and now, pursuant to Section 102.35(a)(10) of the Boards Rules and Regulations, issue this Bench Decision.

The Respondent's Answer admits a number of allegations raised by the Complaint. Based upon those admissions and the record as a whole, I find that the General Counsel has proven all allegations in Complaint paragraph 1, regarding filing and service of the unfair labor practice charges and amended charges in this case.

With respect to complaint paragraph 2, the Respondent's answer admitted the allegations in Paragraphs 2(a), (b), (c), (d) and (e) of the Complaint except that Respondent denies, and here I quote the Answer, "The allegations concerning the nature of their businesses." I understand the Respondent's answer to mean that Respondent admits that L.W.D., Inc., L.W.D. Sanitary Landfill, Inc., L.W.D. Trucking, Inc., Robert Terry, Inc., and L.W.D. Field Services, Inc. are all corporations with offices in places of business in Calvert City, Kentucky. However, it appears that Respondent does not admit that the Complaint accurately describes the type of work performed by each of these entities.

Paragraph 2(f) of the Complaint alleges that these five corporations have been affiliated business enterprises with common officers, ownership, directors, management and supervision, that they have formulated and administered a common labor policy, have shared common premises and facilities, have provided services for and made sales to each other, have interchanged personnel with each other, and have held themselves out to the public as a single integrated business enterprise.

Paragraph 2(g) of the Complaint alleges that these entities constitute a single integrated business enterprise and a single employer within the meaning of the Act. The Respondent's Answer admits that these five entities are affiliated corporations with common ownership and directors, that they have some common management, have shared administrative offices, have provided services to and made sales to each other, and have held themselves out as a single integrated enterprise. Respondent's Answer further admits that these entities constitute a single employer within the meaning of the Act. Based upon Respondent's admissions and the record as a whole, I find that the five corporations named in the complaint constitute a single integrated enterprise and a single employer within the meaning of the Act.

Complaint paragraph 3 alleges that the Respondent's revenues derived from sales and shipments to points outside the State of Kentucky exceeded fifty thousand dollars during the 12-month period ending April 30, 1998. It also alleges that during this same period, the

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Respondent purchased and received at its facility goods valued in excess of fifty thousand dollars directly from points outside the State of Kentucky.

Complaint paragraph 4 alleges that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent has admitted the allegations in Complaint paragraphs 3 and 4. Based upon these admissions and the record as a whole, I find that Respondent meets the Board's standards for the assertion of jurisdiction and that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Further, based upon Respondent's admission of the facts alleged in paragraph 5 of the complaint, I find that the Oil, Chemical and Atomic Workers International Union, AFL–CIO, which I will call the Union, is a labor organization within the meaning of Section 2(5) of the Act.

Paragraph 6 of the Complaint alleges that certain individuals are supervisors of the Respondent and its agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively. Except for one of the persons named, Don Shaun, the Respondent's Answer admits such supervisory status. Based upon the admissions in Respondent's Answer and the entire record, I find that at all material times, the following individuals are supervisors of Respondent within the meaning of Section 2(11) of the Act, its agents within the meaning of Section 2(13) of the Act, and that each individual occupied the position stated after his or her name: Amos Shelton, Chairman of the Board of Directors; William O'Brien, President; Sidney Slaughter, Operations Manager; Timothy G. Scheer, Controller; Margie Louise Shelby, Vice President of Development; Danny Burnett, Senior Operations Supervisor; Chris Dunnigan, Prep Area Supervisor; Mark Borden, Supervisor; Steve Mathis, Trucking Foreman; David Brown, Human Resources Manager.

Paragraph 7 of the Complaint has alleged, and the Respondent's Answer had admitted, that the following employees of L.W.D., Inc. and L.W.D. Sanitary Landfill, Inc., constitute a unit appropriate for purposes of collective–bargaining within the meaning of Section 9(b) of the Act: Included: all production and maintenance employees, plant clericals, plant truck drivers, prep material handlers, solidification employees, stabilization employees, sanitary landfill employees, and shift leaders employed by L.W.D. Inc., and L.W.D. Sanitary Landfill, Inc. Excluded: all employees employed by L.W.D. Trucking, Inc. and L.W.D. Field Services, Inc., contract employees of Robert Terry, Inc., office clerical employees, professional em-

ployees, technical employees, watchmen, guards and supervisors, as defined in the Act.

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Based upon the admission in Respondent's Answer, I find that this unit, which I will call the Unit, is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

Paragraph 8 of the Complaint alleges, and the Respondent's Answer admits, that on December 15, 1997, based on an election conducted by the Board on December 5, 1997, the Union was certified as the exclusive collective bargaining representative of the Unit. I so find. Although Respondent admitted the appropriateness of the Unit and also admitted that the Board certified the Union as the exclusive bargaining representative of the Unit on December 15, 1997, based upon the election which the Board conducted on December 5, 1997, the Respondent denied the allegation raised in Complaint paragraph 9. That paragraph stated as follows: "At all times since December 5, 1997, the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive representative of the Unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment."

Because Respondent admitted that the Board certified the Union as the exclusive representative of the Unit, I find that the General Counsel has proven the allegations in paragraph 9 of the Complaint. During the first year after it is certified, the Board presumes conclusively that a Union is the exclusive collective-bargaining representative. Clearly, this certification year has not ended and the Union's status as collective-bargaining representative cannot be called into dispute. I find that at all times since December 12, 1997, the Union has been, and is, the exclusive representative of the employees in the Unit, by virtue of Section 9(a) of the Act.

However, Complaint paragraph 9 alleges that the Union's status as exclusive representative of the Unit began on December 5, 1997, the date when the election took place. The record contains no evidence to indicate that any employee who voted for the Union on December 5, abruptly had a change of heart or mind during the following ten days. In other respects, the evidence does not provide any basis for a finding that the Union lacked majority support during the ten days following its victory in the election. Therefore, I find in accordance, with Complaint paragraph 9, that at all times since December 5, 1997, the Union, by virtue of section 9(a) of the Act, has been and is now the exclusive representative of the Unit for purposes of collective bargaining.

Respondent's Answer admitted certain other allegations raised in the Complaint. However, I will discuss these admissions later in connection with an evaluation of each individual unfair labor practice allegation.

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We will first take up Complaint paragraph 10. The first of the unfair labor practice allegations are found in Complaint paragraph 10, which alleges that Respondent, by it's senior operations supervisor, Danny Burnett, made unlawful statements to employees on about December 3 and 4, 1997. Because the amended version of Complaint paragraph 10 differs significantly from earlier ones, it may be helpful to describe the allegations in detail as they are now constituted.

Paragraph 10(a)(1) alleges that on about December 3, 1997, Burnett interrogated an employee about the employees Union membership activities and sympathies of other employees.

Paragraph 10(a)(2), as it now exists, alleges that on about December 3, 1997, Burnett informed employees that it would be futile for them to select the Union as bargaining representative by telling an employee that Respondent would not sign a contract and that its employees were not going to gain anything.

Paragraph 10(b)(1) alleges that on about December 3 and 4, 1997, Respondent, acting through Burnett, interrogated employees about their Union membership, activities and sympathies.

Paragraph 10(b)(2) alleges that during the same period, Burnett solicited employees' complaints and grievances and promised the employees improved terms and conditions of employment if they voted against the Union.

Paragraph 10(c)(1) alleges that on about December 3, 1997, Burnett interrogated an employee concerning the employee's Union membership, activities and sympathies.

Paragraph 10(c)(2) alleges that on the same date, Burnett told an employee that Respondent could not afford a union, which indicated that it was futile for the employees to select the Union as their collective-bargaining representative.

The Respondent has denied all these allegations. Employee Kevin Morris testified that on about December 3, 1997, his immediate supervisor sent him to the office of Senior Operations Supervisor Burnett and that no one else was present when he spoke with Burnett. According to Morris, Burnett asked him what he thought about the Union. Morris testified that he told Burnett that there were problems in the plant and that it would not be an overnight fix. Morris quoted Burnett as responding that Amos Shelton would not stand for any Union at L.W.D. and would not sign a contract.

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Employee Tray Neil Bobo testified that about two days before the election, he was called to Burnett's office. Bobo was an open supporter of the Union who wore Union insignia on his clothing. In Bobo's words, which I quote, "Burnett pretty much asked me how I felt about the Union and he asked me, told me, the purpose was, he was going to try to talk me, persuade me that the Union wasn't the right idea for L.W.D. at this time."

According to Bobo, Burnett asked him what he, Bobo, thought the Union could do for the company. After Bobo responded that it would be nice to have a contract, as Bobo put it, so "everything would be pretty much in stone," Burnett responded that he did not think Amos Shelton would "take it very good." Bobo further testified that Burnett said that the new plant manager was going to bring a lot of changes and was going to try to give the employees a pretty good deal.

Another employee who was an open Union adherent, Mike Leech, testified that about two days before the election, Burnett was calling each person on their shift into his office for a one–

on–one talk. According to Leech, when Burnett saw the stickers on Leech's hat, he said it was obvious how Leech felt about the Union. To quote Leech's testimony, "Basically, he wanted me to think about my decision. He wanted me to give Bill O'Brien a chance." Leech further testified that when he left, Burnett told Leech that he needed to vote like his job depended on it. Based upon my observations of the witnesses, I credit Leech's testimony.

Another employee, Scott Norman, also displayed his open support for the Union on his hard hat. After he was called into Burnett's office on December 3rd, Norman testified, Burnett just looked at the stickers on Norman's hard hat and began shaking his head. According to Norman, Burnett then asked why Norman believed the employees needed a Union. After Norman responded, Burnett said he wished that Norman would give the new management a chance before they voted the Union in, that Burnett believed that the new company president, William O'Brien, and the new operations manager, Sid Slaughter, would make the changes that needed to be made.

The testimony of still another employee, Lee Hansen, further suggests that Burnett's efforts to persuade employees went beyond ordinary expressions of opinion and extended to unlawful questions about the Union sympathies of the employees. Hansen credibly testified that about two days before the election, he was told to go to Burnett's office, where Burnett explained that their meeting related to the upcoming Union vote. Hansen testified that Burnett asked him, "what I was going to vote—what I was going to do come the day of the vote."

When Burnett testified, he admitted asking supervisors to send employees up to his office and said that he spoke with at least fourteen employees for sure, although he did not recall any of their names. Burnett denied interrogating any employees about their Union

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activities or the Union activities of other workers. He also denied telling an employee that the company would never sign a contract with the Union. Similarly, he denied ever telling employees that they were not going to gain anything and that it would be futile for them to select the Union. However, Burnett did admit asking employees what their complaints or grievances were, although he did deny promising to remedy such problems.

To the extent that Burnett's testimony contradicts that of Morris, Bobo, Leech, Hansen, and Norman, I do not credit it. The testimony of the employee witnesses forms a consistent picture, that, two days before the election, Burnett embarked upon a campaign to sway employees to vote against the Union. Additionally, I base this credibility determination upon my observations of the witnesses. In particular, Bobo's demeanor when testifying impressed me as being truthful and his testimony is consistent with that of the other employee witnesses.

In reaching the decision to credit Morris rather than Burnett, I note that both of them testified that the meeting in question took place after the time when Burnett usually would leave work for the day. In fact, Burnett's testimony establishes that he met with at least fourteen people after his normal quitting time. Clearly, these meetings were out of the ordinary and had only one obvious purpose, discussion of the Union with employees.

It seems unlikely that Burnett would go to the trouble of having supervisors send employees to his office but then only ask them one question. Moreover, although Burnett denied interrogating any employee about Union activities, he admittedly did solicit information from them about their grievances. Burnett testified, and I quote, "I did ask them somewhat some of their complaints, but no, I did not promise them anything."

Some of the employees summonsed to Burnett's office were open Union supporters. The facts therefore, must be examined closely to determine, using the analytical principles expressed by the Board in *Rossmore House*, 269 NLRB 1176 (1984), whether Burnett's asking them about their Union sympathies violated Section 8(a)(1) of the Act.

In *Smith and Johnson Construction Co.*, 324 NLRB No. 153, decided October 31, 1997, the Board affirmed the administrative law judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The judge had described that analysis in these terms which I quote verbatim from his decision: "In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about Union sympathies and activities turned on the question of whether, 'under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.' The Board, in *Rossmore House*, noted the [test set forth in *Bourne Co. v. NLRB*,

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332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The *Bourne* test factors are as follows: 1. The background, i.e., is there a history of employer hostility and discrimination? 2. The nature of the information sought, for example, did the interrogator appear to be seeking information on which to base taking action against individual employees? 3. The identity of the questioner. That is, how high was the questioner in the Company hierarchy? 4. The place and method of interrogation, for example, was the employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'? and 5. The truthfulness of the reply."

I will apply the same analytical framework here, which the Board approved in *Smith and Johnson Construction Co.*, which I have just quoted.

Burnett is not a first time supervisor but rather is the Respondent's senior operations supervisor. He had his subordinate supervisor call the employees into his office, a locus of authority, and he spoke with them one on one. Moreover, Burnett spoke with Morris and other employees only two days before the representation election. In these circumstances, it appears clear that Burnett's statements reasonably would tend to interfere with, restrain and coerce employees in the exercise of their Section 7 rights. I find that these statements constitute unlawful interrogation and solicitation of grievances. Additionally, it is clear that statements which constitute threats reasonably would tend to coerce employees, regardless of their Union sympathies. Statements that bargaining would be futile

would have similar coercive effects, without regard to the Union sympathies of the employees who heard them.

Complaint subparagraphs 10(a)(2) and 10(c)(2) allege that about December 3, 1997, Respondent, by Danny Burnett, made statements conveying to employees the message that collective bargaining would be futile and unproductive. The testimony of Morris and other employee witnesses, which I have already discussed and which I do credit, establishes these allegations. I find that Burnett did tell employees that Respondent's chairman, Amos Shelton, would not stand for any Union at L.W.D. and would not sign a contract. Applying an objective standard, I conclude that these statements reasonably would coerce an employee in the exercise of Section 7 rights. I find that Burnett made the statements attributed to him in paragraph 10 of the Complaint and that these statements interfered with, restrained, and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

We turn now to complaint paragraph 11. Originally, complaint paragraph 11 alleged that three different supervisors interrogated employees about their Union membership, activities and sympathies. In the June 1998 amendment to the Third Consolidated Complaint, the General Counsel, in effect, disclaimed attempting to prove that Don Shaun, on December 4, 1997, interrogated any employees. Later, during the course of the hearing, the General

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Counsel effectively disclaimed that Chris Dunnigan, on December 5, 1997, interrogated employees. Therefore, I recommend that these allegations in Complaint paragraph 11 be dismissed.

However, that paragraph also alleges that in mid–November 1997 the Respondent's foreman, Steve Mathis interrogated employees about their Union membership, activities, and sympathies. Employee Walls testified that about two weeks before the election, supervisor Mathis spoke with him in the Respondent's truck shop. According to Walls, Mathis asked "Why are you supporting the Union?" and Walls replied "Well, I think we need a contract saying what we have and what we don't have."

According to Walls, Mathis responded, "Well, I respect your opinion on that" and that was the end of the conversation. The version given by Mathis is rather different, but if credited, it would also establish a Section 8(a)(1) violation. The difference is that the testimony given by Walls establishes interrogation in violation of Section 8(a)(1), while the version given by Mathis proves an unlawful threat. Based upon my observation of the witnesses, I credit Mathis's version.

He testified that after seeing some employees passing out Union leaflets near the facility, he came into the shop and said, "I'm afraid them guys are messing up."

According to Mathis, his comment made Walls angry. Walls said he had belonged to a Union before. Mathis replied "I belonged to one, too, and they really messed me up in the past." Mathis later apologized to Walls for offending him and told Walls that he respected Walls opinion.

Mathis impressed me as being a sincere witness and it appears clear that when he told employees that the Union handbillers were messing up, he was only expressing an opinion based upon his personal experience.

However, intent is not an element of a Section 8(a)(1) violation. As the Board stated in *Waco, Inc.* 273 NLRB 746, 748, (1984), "It is too well settled to brook dispute that the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act."

Applying an objective standard, I find that Mattis's statement that the employees who handbilled were "messing up" reasonably would be understood as a threat of unspecified

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reprisal which would chill the exercise of Section 7 rights. Further, I find that this matter has been fully litigated at the hearing. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) by this comment. However, I conclude that the evidence is insufficient to establish that Mathis interrogated an employee as alleged in paragraph 11 of the complaint and recommend that such allegation be dismissed.

Turning to Complaint paragraph 12.

Paragraph 12 of the Complaint alleges that about December 17, 1998, Respondent by Mark Borden, by oral announcement, promulgated and since then has maintained the following rule. "Any group of more than two employees caught talking Union would be considered as a strike in place and the employees would be terminated."

Employee Frank Holloway testified that supervisor Borden told him, "that for my information, if more than two employees were caught talking about the Union, it would be considered a strike in place and they would be terminated."

Borden testified, "What I told Frank was that if they had a group together and then that would consist of more than two people during work hours, that that could be construed as a strike in place, if they were – had jobs to do, had work to do and they were not doing that, they were doing other business. However, I never implied termination in that at all."

Borden could not recall whether this conversation took place before or after the December 5, 1997 election. Holloway's testimony indicates it took place after employees were laid off or terminated around December 7, 1998. I find that Borden made the statement to Holloway sometime between December 7 and December 17, 1998.

Based upon my observations of the witnesses, I credit Borden's testimony to the extent it conflicts with Holloway's. However, I find that the statement constitutes an unlawful restriction on employees' Section 7 rights to discuss the Union, regardless of which version is credited.

It appears that Mr. Borden's motive was innocent of any anti-Union animus. However, as already noted, intent is not an element of a Section 8(a)(1) violation. I recommend that the Board find that Respondent violated Section 8(a)(1) as alleged in paragraph 12 of the Complaint.

As amended, paragraph 13(a) of the Complaint alleges that about December 12, 1997, Respondent, by William O'Brien, by telling an employee who had been Laid off that its

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employees had been told to vote as if their jobs depended on it, implied that its employees had been laid off because the Union was selected as their collective bargaining representative.

Paragraph 13(b) alleges that on October 2, 1998, Respondent by William O'Brien, in a letter, threatened its employees with job losses if the employees selected the Union as their bargaining representative.

With respect to the allegation in Complaint paragraph 13(a), employee James Malone received a layoff notice on December 12, 1997. As he was escorted out of the plant, he noticed that the Respondent's president, William O'Brien, was in the guard house. Malone went in and shook O'Brien's hand. They discussed Malone's prospects for being recalled. Malone testified that he recalled O'Brien saying that the employees had been told to vote as if their jobs depended on it.

Although O'Brien testified, he did not deny making the statement which Malone attributed to him; therefore, I find that O'Brien did remind Malone that the Respondent had informed employees to vote as if their jobs depended on it. In the context of the conversation that Malone just having been notified that he was out of work, the link between the outcome of the representation election and the employees loss of work, is obvious. I find that O'Brien's comment violated Section 8(a)(1) of the act as alleged in Complaint paragraph 13(a).

However, I do not find that the letter described in complaint paragraph 13(b) violates the Act, although the question is very close. The letter varies to some extent from the description in the amendment to the Complaint, but it clearly expresses the Respondent's dislike of unions and desire to remain non-union. However, such expressions do not contain a threat of reprisal or a force or promise of benefit and thus, under Section 8(c) of the Act, do not constitute unfair labor practices. The statement in the letter urging employees to think about it carefully and "on the day of the election, vote as if your job depends on it," comes quite close to the line.

The term "as if" grammatically insulates the sentence from being an outright threat. If the words "as if" were removed, the sentence would read, "Vote, your job depends on it," which might easily constitute a threat. However, the plain meaning of the phrase "as if" conveys the sense of something untrue or not likely to be true. Indeed, the phrase seems to have currency among teenagers who can express, with practiced inflection, a multitude of doubt with those two two–letter words. The words bring the same cargo of doubt to the sentence tying an employee's vote to his job security. I conclude that the sentence does not constitute a threat or reprisal and therefore, is protected by Section 8(c). Therefore, I recommend that this allegation be dismissed.

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However, in the case of the statement alleged in paragraph 13(a) of the Complaint, the context of the statement, coupled with the actual existence of a layoff, transforms the statement from being merely conditional or subjunctive into a statement which equates the way the employees voted with the outcome of employees being discharged or laid off. Therefore I find that paragraph 13(a), does allege and that the General Counsel has proven that violation.

Turning now to Complaint paragraph 14. Various amendments have increased the number of allegations in Complaint paragraph 14. For clarity, I will describe each allegation before discussing the evidence relevant to it. Paragraph 24 of the Complaint alleges in part that the conduct described in paragraph 14 violates Section 8(a)(1) of the Act. However, the Complaint does not allege that the conduct described in paragraph 14 violates other sections of the Act.

Turning to paragraph 14(a). Complaint paragraph 14(a) alleges that on about April 6, 1998, Respondent, by David Brown, at Respondent's facility, told its employees that a scheduled wage increase had been cancelled because of the Union campaign.

Employee Frank Holloway is a member of the Union's bargaining committee. He testified that at a negotiating session on April 6, 1998, Human Resources Manager David Brown, and the Union's international representative, Judith Wilson, became involved in a discussion about wage increases. Holloway stated in part as follows, "Ms. Wilson, at one point, asked Mr. Brown if he would take a two dollar. . .an hour wage cut. Mr. Brown replied that he hadn't had a raise in several years. He mentioned that they had had one scheduled for September but due to the Union campaign couldn't give it to us."

According to Holloway, Ms. Wilson replied that if a wage increase had been scheduled in September, Respondent should give it to the employees right then.

Ms. Wilson's testimony corroborates Mr. Holloway's. She testified that during this discussion with Human Resources Manager Brown, he told her that he had not had a wage increase in four years, to which she responded, "well, neither have these men."

Brown disagreed, stating that the employees got a wage increase every year across the board, and (quoting here from Wilson's testimony) "As a matter of fact, they were going to get one in September and we couldn't give it to them because of the Union campaign."

At that point, according to Wilson, Holloway protested that he had not received wage increases across the board in the previous four years but Brown disagreed.

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Another member of the Union's negotiating committee, employee Paul Roberson, corroborated the testimony given by Holloway and Wilson. Describing the April 6, 1998 bargaining session, Roberson quoted Human Resources Manager Brown as saying that the employees had a yearly scheduled pay raise scheduled for September but they could not implement it because of the Union campaign going on at that time.

Local Union President Jeffrey Remage, who was also employed by Respondent, attended the April 6, 1998 bargaining session. His testimony corroborated that Roberson, Wilson and Holloway.

Additionally, International Representative Ray West attended the April 6, 1998 bargaining session. West testified that at one point, Human Resources Manager Brown told the Union negotiators that, to quote Mr. West, "There was a great pay increase scheduled for the workers at L.W.D. in September but since this Union thing came along, we couldn't do it."

Although Human Resources Manager Brown took the witness stand four times during the hearing, he did not specifically deny the statements attributed to him by the members of the Union's bargaining committee. In light of this uncontradicted testimony, I find that Brown did tell the Union negotiators that unit employees had been scheduled to receive a raise in September but that the Respondent could not give it because of the Union organizing campaign.

Because paragraph 14 of the Complaint only describes conduct alleged to violate Section 8(a)(1), but not other sections of the Act, the question presented is solely whether Brown's statement interfered with, restrained or coerced employees in the exercise of Section 7 rights. I find that it did.

It might be argued that Brown's statement reflected an assumption that it would be unlawful for the Respondent to grant a wage increase at a time the Union was organizing the facility because announcement of a wage increase might constitute an unlawful promise of benefits which itself might interfere with the employees' exercise of Section 7 rights. However, that is not what Brown said.

Brown's words—that employees were scheduled to get a wage increase but did not receive it because of the Union—convey a message that Respondent was retaliating because employees selected a union to represent them. Such a statement clearly interferes with Section 7 rights and I find, violates Section 8(a)(1) of the Act.

Paragraph 14(b).

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Complaint paragraph 14(b) alleges that on about December 3, 1997, Respondent, by Human Resources Manager David Brown, interrogated an employee about his Union sympathies and informed an employee that a scheduled wage increase had been cancelled because of the Union campaign. The government elicited testimony from employee Daniel Crass concerning a conversation with Brown on December 3, 1997. However, Crass's testimony was confusing.

At one point, Mr. Crass testified that Brown, "said we was going to get fifty cent raise and if the Union already started, then we probably wouldn't get it anyway." Mr. Crass then testified, and again I quote, "I asked him if the Union lost, would we still get the fifty cents. He said, no, probably not." When asked if those were Brown's exact words or Mr. Crass's impression of what Mr. Brown said, Crass responded, "No that's his exact words."

Were I to credit Mr. Crass's testimony, I would have to conclude that Mr. Brown had made a statement likely to get more employees to vote for the Union, namely, that if the Union lost, they would not get a raise. Such a statement would be inconsistent with the record as a whole.

It is possible that the witness simply became flustered on cross examination and misspoke. However, Mr. Crass made a similar statement on direct examination, when he testified that he asked Brown, "If the Union doesn't pass, would we still get a fifty cent raise and he said, no, probably not."

During oral argument, the General Counsel, in essence, withdrew the allegation in Complaint paragraph 14(b)(1). Therefore, I recommend that this allegation be dismissed.

However, I believe that the difficulties apparent with Mr. Crass's testimony regarding the allegations in paragraph 14(b(1) also call into question the reliability of his recollection on other matters as well. I am reluctant to trust his memory with respect to the other allegation in Complaint paragraph 14(b) concerning an interrogation of an employee about the employee's Union sympathies.

In sum, I find that the Government has not proven the allegations in Complaint paragraph 14(b), and recommend that they be dismissed.

* * *

Complaint paragraph 14(c) alleges that in early November 1997, Respondent by Nathan Salyers, promulgated a rule which prevented the distribution of Union literature in the employee breakroom. To prove this allegation, the Government elicited testimony from

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former employee Paul Roberson, who testified that he had a conversation with Salyers in the break room when no one else was present. Mr. Roberson testified and I quote, "Nathan Salyers informed me that if there was any Union material left out that he was suppose to pick it up and destroy it."

On cross examination, Mr. Roberson admitted that Mr. Salyers never told him he could not distribute Union literature in the break room and Mr. Roberson also admitted that he was able to do so. Therefore, it appears clear that there is no rule which prohibits distribution of Union literature. In fact, the evidences does not establish that there is any rule prohibiting an employee from leaving Union literature lying around the break room. If there is a rule at all, it is simply that if someone leaves Union pamphlets around the break room then they will be thrown away.

The record is insufficient to establish any sort of discrimination by management in deciding what literature will stay on the break room tables and which will wind up in the recycle bin. I conclude that the government has not proven the allegations in Complaint paragraph 14(c). For that reason, I do not reach the further question of whether Nathan Salyers is a supervisor or agent to the Respondent in recommending that paragraph 14(c) be dismissed.

Complaint paragraph 14(d)(1) alleges that in late November to early December 1997, Respondent, by Joe Payne, solicited employees complaints and grievances.

Complaint paragraph 14(d)(2) alleges that Payne threatened an employee with loss of unspecified wages or benefits if the employees selected the Union as their bargaining representative. However, in oral argument, Counsel for the General Counsel indicated an intention to delete paragraph 14(d)(2). Therefore, and in the absence of evidence to establish the violation alleged, I recommend that complaint paragraph 14(d)(2) be dismissed.

Regarding the allegation in paragraph 14(d)(1), the government offered testimony from employee Merlin Reed who had been highly active on behalf of the Union. In fact, Reed testified that he made the initial contact with the Union. Later in the campaign, Reed wore the Union emblem and distributed Union leaflets at the gate to the Respondent's facility. In sum, Reed's Union activities were not only obvious but rather inescapable.

Reed testified that Payne was his supervisor and that a week or so before the December 5th election, he went to Payne to make some photocopies. According to Reed, Payne said that he wanted to ask Reed a hypothetical question. Reed testified that Payne asked, "Just what is it you all expecting to gain from this?"

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Reed said the employees wanted a "word in the workplace." Payne asked, "just what is one thing that has got you guys, you know, what is the Union going to do for you?" Reed replied that the employees' insurance had changed. When Payne responded that insurance had changed at a lot of plants, another employee came along and the conversation ceased. Considering that this conversation did not occur in a locus of authority, that it did not seek information which could be used for retaliation against Union adherents, that it did not involve any official of higher management, and that the employee questioned was an open supporter of the Union, I conclude that Payne's statements and questions reasonably would not tend to interfere with, restrain or coerce employees in the exercise of Section 7 rights. See *Rossmore House*, 269 NLRB 1176 (1984); *Smith and Johnson Construction Co.*, 324 NLRB No. 153 (October 31, 1997).

Additionally, I note that Section 8(c) of the Act states that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no treat [sic] of reprisal or force or promise of benefit." Payne's statements to Reed did not contain any threat of reprisal or force or promise of benefits. In these circumstances, I need not reach the question of whether Payne was then a supervisor of the Respondent or its agent. I recommend that the allegations in Complaint paragraph 14(d)(1) be dismissed.

During the hearing, the General Counsel amended the Complaint to add a paragraph 14(e) which alleged that on a date between October 30, 1997 and December 5, 1997, Respondent, by Nathan Salyers, at Respondent's facility, interrogated employees concerning their Union sympathies. The government added this allegation after Salyers testified on cross examination that every night, he would tidy up the break room by throwing away paper lying around on the tables. When employees began leaving Union leaflets on the tables, Salyers testified, before he threw them in the trash, he would hold them up and would ask if anyone wanted to read them. It is clear from Salyers testimony that he regarded it as a courtesy to do so, and I did not gather any indication that Salyers was trying to trick anyone into revealing that he was a reader, overt or covert, of such Union material.

It is clear that Salyers had been tidying up the break room for a long period of time and that this practice of asking if anyone wanted something before it was thrown out did not begin when the Union literature began appearing on the tables. Although Salyers' intent in asking the question is irrelevant to establishing any 8(a)(1) violation, it remains relevant to understanding how employees would interpret Salyers' question. The fact that Salyers had a longstanding habit of throwing away items which cluttered the table certainly would affect how employees reasonably would understand his question. Moreover, they were under no compulsion to answer or else forfeit something of monetary value.

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Therefore, I cannot conclude that asking the question, "Does anyone want this?" constituted an interrogation which interfered with, restrained or coerced employees in the exercise of protected rights.

Even though another employee testified that Salyers was not, in his opinion, a "neat freak," I believe that is somewhat beside the point. Salyers seemed motivated by attention to courtesy as much as by attention to neatness.

In any event, because I do not find the casual questions to be coercive, I need not decide whether or not Salyers is a supervisor or agent of the Respondent. I recommend that complaint paragraph 14(e) be dismissed.

Paragraph 14(f). Also of the hearing as General Counsel amended the Complaint to allege a paragraph 14(f), which stated "From September 22, 1997 through December 5, 1997, Respondent, by Harland Timmons, at Respondent's facility, solicited employee complaints and grievances and implicitly promised to resolve their complaints and grievances."

Timmons has held the title of Maintenance Supervisor for fifteen years and has a crew of fifteen employees. He testified that after the Union campaign began, he spoke with these employees. He told them, and I am quoting Timmons directly, "That the company couldn't stand the Union right now. The finances would not allow it and there was really no need for a Union."

Timmons also testified that he asked the employees what they were looking for and told them, "The company has no money. You can't get any more money. You've got a real good benefit package now. The Union cannot guarantee you a job. If the company cannot afford to have you, then you still don't have a job, with or without the Union."

Timmons also admitted in his testimony that he told employees he would check into their problems and do what he could. I find that these comments, if made by a statutory supervisor, would constitute an unlawful solicitation of grievances. The question then arises as to whether Timmons is a statutory supervisor.

Although the record does not squarely address what indicia of supervisory status Timmons possesses, I find that it is sufficient to establish that he was a supervisor within the meaning of Section 2(11) of the Act at the time he made the statements in question. Thus, I note that Timmons evaluated employees un-

der the "forced ranking" program instituted by the new management, and that these evaluations determined which employees were laid off. Since I conclude that Timmons is a supervisor, I further conclude that the statements he made are

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attributable to the Respondent and that Respondent thereby interfered with, restrained and coerced employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

Complaint paragraph 15. Complaint paragraph 15(a) and b allege that Respondent suspended its employee, Gregory A. Cummins, on about November 11, 1997 and discharged him on about November 21, 1997.

Complaint paragraph 15(c) as amended, alleges that about December 12, 1997, the Respondent terminated the employment of William Jeffrey Walls. The Respondent admits these allegations but it denies the conclusions alleged later in the complaint that these actions violated Sections 8(a)(1) and (3) of the Act.

Cummins made his support for the Union known to management during an employee meeting sometime in late October 1997. According to Cummins, when the Respondent's new President, William O'Brien, expressed an opinion that the Union was undemocratic, Cummins replied and I quote, "Well, I didn't think the company was very democratic because I had a 3 out of a 4 on an attitude and then they tried to fire me a week later."

Cummins testified that he also said he did not think the Respondent's employee handbook was worth the paper it was written on, and that he was going to vote for the Union. Cummins was the first to speak out on behalf of the Union at the meeting but others followed.

Also in late October 1997, Cummins used vulgar language when asking another employee where he had been and what he had been doing. When management found out, they called Cummins in for a meeting with President O'Brien and Operations Manager Slaughter. They told Cummins they had received some complaints that he had verbally abused two co-workers.

Cummins defended himself by arguing that the offense had been trivial. Specifically, he testified that he told the manager that, "All I said to them was that I asked them where the fuck they had been and that I got tired of looking for them every damn time I turned my back." Cummins added, "It ain't nothing that hadn't been used before."

President O'Brien told Cummins that management would look into the matter further. Subsequently, the Respondent suspended and then discharged Cummins as alleged in the complaint.

The testimony of Robert Palmer, one of the two employees whom Cummins cursed, paints a more serious picture regarding the duration of the tongue-lashing Cummins gave them. Palmer testified that he told management that although he did not want Cummins to lose his

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job, he, Palmer, could not work with him. He asked management either to reassign Cummins or to reassign him, so that they would not have to work together. Significantly, Palmer informed management that Cummins had cursed them for an hour. Based upon my observations of the witnesses, I credit Palmer. The General Counsel adduced evidence to support the government's theory that other persons employed by the Company had also used foul language at other workers but had not been discharged. Thus, the General Counsel argues, the evidence establishes that Respondent treated Cummins differently because of his Union activities.

However, I believe that other aspects of the situation besides the swearing itself, distinguish it and make it more serious than the instances which the Government holds up as comparable in severity. The duration of Cummins' tirade, an hour, certainly concerned management. Cummins also had a history of problems working with others.

Besides the questions of foul language and self control, management was also concerned about the issues of honesty and trust. Other witnesses do not support Cummins' explanation that he had spent an hour looking for the two other employees. Considering all of these factors and considering that one employee was so upset by the instance he requested a transfer, I cannot conclude that the Respondent treated Cummins disparately.

Discussing the issue in the frame work of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 US 989 (1982), it is clear that the General Counsel has established a *prima facie* case. Cummins engaged in union activities in front of management. Thus, the elements of protected activity and employer knowledge have been established. The Respondent suspended and discharged Cummins, which certainly constitute adverse employment actions. The timing of these actions, in the context of the Union's organizing campaign and the 8(a)(1) violations which I have found in this case, provide a nexus sufficient to establish the fourth element.

However, I find that Cummins' behavior, and its impact on other employees, was so extreme that the Respondent would have discharged him regardless of protected activities. Therefore, the Respondent has rebutted the General Counsel's *prima facie* case. I recommend that Complaint paragraph 15(b) be dismissed.

Complaint paragraph 15(c). It is undisputed that Respondent terminated employee William Jeffrey Walls as alleged in the Complaint, as amended. However, Respondent contends that it was not motivated by anti-Union animus and instead, laid off Walls for economic reasons.

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Walls supported the Union and was listed on Union fliers as a supporter. Thus, his open advocacy of the Union, satisfies the first two *Wright Line* elements. His discharge certainly satisfies the requirement of an adverse employment action, and based upon its timing, three days before the Board certified the Union, and a week after the Union election, I find that the necessary link has been established. Therefore, the Government has proven it's *prima facie* case.

In this instance, Respondent defends by claiming that Walls did not have enough work to do, since a tool, called the Maxigrinder, no longer was used. However, as the General Counsel has pointed out, the Respondent stopped using the Maxigrinder on a regular basis some months previously. Based upon this fact and the record as a whole, I conclude that Respondent has failed to rebut the General Counsel's *prima facie* case. I recommend that the Board find that Walls' discharge violated Sections 8(a)(1) and 3 of the Act.

Complaint paragraph 16. Paragraph 16 of the Complaint alleges that about December 8, 1997 and continuing thereafter, Respondent failed and refused to grant a 50–cent–per–hour across–the–board wage increase to unit employees, while granting said wage increases to non-union employees. The compliant alleges these actions to constitute discrimination in violation of Section 8(a)(3) of the Act and also an unlawful unilateral change in violation of Section 8(a)(1) and (5) of the Act.

For the alleged action to constitute discrimination in violation of Section 8(a)(3), there must be a showing that Respondent had committed itself to providing such a wage increase to Union employees and then rescinded this action as a means of discouraging Union activities or otherwise to chill the exercise of Section 7 rights. The record does not establish that Respondent had made such a firm decision to grant such wage increases.

The evidence certainly indicates that management officials were considering this action but I find that they had made no final decision about it. In this regard, I particularly credit the testimony of Linda Tutor, the Respondent's collection agent. Her demeanor as a witness, and especially her resolve during cross–examination, greatly impressed me.

I conclude that Respondent did not discriminate against the Union employees by withdrawing a raise because the Respondent had not decided to grant a raise. It was only thinking about it.

Although I have found that Respondent violated Section 8(a)(1) when it's human resources manager said that employees would have gotten a raise but did not because of the Union campaign. I do not find that the human resources manager was telling the truth in making such statement at the bargaining table. Sometimes negotiators do not tell the truth.

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To establish that failing to grant a wage increase violates Section 8(a)(5) of the Act, the government must show that the Respondent has granted such raises in the past with such predictability that a wage increase at a particular time has become a term and condition of employment. Only if giving a raise is a term and condition of employment can withholding the raise be considered a unilateral change in the terms and conditions of employment. Here, the record does not establish that Respondent had established such a practice.

By amendment, the General Counsel is alleging, alternatively, that Respondent violated Section 8(a)(3) of the Act by failing to grant a wage increase in September 1997. For the same reasons stated above, I find that the evidence does not support finding such a violation.

The remainder of the Complaint concerns the selection of employees for layoffs and the treatment they received when called from layoffs. On December 12, 1997, at a time Respondent laid off his employees named in complaint paragraph 17, the Union was about to be certified as the exclusive collective bargaining representative and the employees had just chosen it in the Board–conducted election. The Respondent selected the employees named in Complaint paragraph 17 for layoff based upon a "forced ranked system" which its new President O'Brien had pushed. This system involved supervisors rating employees, and then management using the ratings to rank the employees most useful to retain and those most helpful to be laid off.

Respondent implemented this system without notice to and bargaining with the Union about it. It is well established that an employer acts at its peril when making any change in mandatory terms and conditions of employment after employees have selected a union in a Board–conducted election leading to a certification. Here, a week before the layoffs, the employees had chosen the Union which was clearly their exclusive collecting bargaining representative. At this point, the Respondent had a duty to notify and bargain with the Union before making any change in the way it selected employees for layoffs.

Use of a forced ranking system scheme clearly was such a change. It was a new way brought to the Company by it's new president, and it clearly involved a mandatory subject of bargaining. Respondent had a duty to notify and bargain with the Union before implementing it. Therefore, I find that the Respondent's layoff of the named employees on December 12, 1998 was an unlawful unilateral change in violation of Section 8(a)(1) and 5 of the Act. I recommend that the Board find this violation and that the Respondent be ordered to make whole the Affected employees for losses they suffered because of the unfair labor practices.

Respondent's continued use of the forced ranking system and its subsequent layoff of employees selected by that process on March 12, 1998, also transgressed its duty to bargain

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with the Union. No valid impasse may be reached in the presence of the unremedied unfair labor practices that I have found in this case.

On the other hand, I do not conclude that the evidence supports a finding that Respondent discriminated against the named employees in violation of Section 8(a)(3). Respondent has provided substantial evidence of economic problems which provide a compelling, nondiscriminatory reason for the layoffs.

I do not find sufficient evidence of animus in the record to conclude that the layoffs constituted an effort to retaliate against the employees because of the Union organizing drive. Additionally, there does not appear to be a clearcut pattern of selecting Union adherents for layoff while retaining those opposed to the Union and using the forced ranking system to conceal it.

In sum, I do not conclude that the evidence supports finding that the General Counsel has made a *prima facie* case of discrimination. Therefore, I will recommend that the Section

8(a)(3) allegations be dismissed with respect to the employees selected for layoff.

For reasons similar to those just discussed, I conclude that Respondent did not discriminate against laid off employees by recalling them to general labor pool positions, as alleged in paragraph 18 of the Complaint. However, I do find that this action constitutes an unlawful unilateral change in violation of Section 8(a)(5).

When the transcript of this proceeding has been received at the Division of Judges, I will prepare a Certification of Bench Decision which will attach the transcript portions containing this Bench Decision. The Certification will also contain specific Remedy, Order and Notice provisions which will embody my recommended findings and conclusions. It will be served upon the parties and at that point, the time period for filing an appeal of my decision will begin to run.

During this proceeding, all counsel and representatives have displayed an outstanding ability to work with each other in a productive and professional manner. I clearly appreciate the civility and courtesy you have shown to each other and to me throughout this proceeding. Thank you.

The hearing is closed.